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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269

MARGARET M. BRADY, as Administratrix of JAMES P. BRADY, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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A. THE REAL QUESTION INVOLVED HEREIN.

The real question presented by this petition is whether there is any reason for this court to change the sensible construction of the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, which this court made in 1930, which has been followed ever since by bench and bar, which was followed by the Circuit Court of Appeals in the case at bar, and which at the present moment is being used as a point of departure in current legislation.

This court construed the Suits in Admiralty Act in the cases of *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation* and *U. S. Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320. That was in 1930.

In substance, this court said that Congress had provided that thereafter neither the United States, nor a corporation

whose stock was wholly owned by the United States, nor a private corporation which was operating a vessel for the United States, could be sued at common law for a maritime tort. For all remedies which had existed up to the time of the passage of that act against any of the above-mentioned entities Congress had substituted an action in Admiralty, which might be brought against either the United States or against its wholly owned corporation, "as the case may be".

This court not only said but held (for the precise point was involved) that the private operating agent for the United States was immune from suit.

Accordingly, it directed that the judgment which had been obtained in that case against the private operating corporation be reversed and the cause "remanded with directions to dismiss." 280 U. S. 320, 327.

Thereafter, in deference to this court's direction, the judgment, which was against the private operating corporation as well as against the Government-owned corporation, was vacated and the action dismissed. The plaintiff then sued the United States in Admiralty. *Lustgarten* v. *United States*, 5 F. Sup. 746. He obtained a decree for maintenance and cure in the sum of $784, but the case went against him on the merits on the causes of action for negligence.

However, the common-law judgment which the plaintiff had obtained in the *Lustgarten* case against the private operating corporation, and which had been reversed by this court, was not simply for a seaman's maintenance and cure, as Judge Clark has asserted in his dissenting opinion below, and as the petitioner now asserts in his brief, R. 52, Petitioner's Brief, page 20. The judgment was for a tort caused by negligence and was in the sum of $10,226.50. 280 U. S. 320, at 323; Lustgarten Record, at page 34.

The Supreme Court, in holding that the private operating agent for the United States could not be sued, did not, as Judge Clark has said, refer to it "only summarily as 'other agents.'" The Supreme Court said the following, and what was said referred necessarily and pointedly to the private operating agent involved in the *Lustgarten* case, against whom there had been rendered a tort judgment for a substantial sum of money:

> "Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." (Italics ours.)

The Supreme Court did not, as intimated by Judge Clark, reverse the judgment against the operating agent through inadvertence. Not only the opinion, but the syllabus as well, shows that the court knew well that the judgment was against both the United States Shipping Board Emergency Fleet Corporation, a Government-owned corporation, and against Consolidated Navigation Company, Inc. a private operating agent. When the Supreme Court reversed this judgment and directed a dismissal, undoubtedly it intended the result which it directed.

Ever since that decision it has been well understood that private operators of Government vessels who are act-

ing as agents for the United States are not suable for maritime torts. The United States has been sued in the place of its agent.

The Court of Appeals of New York understood this. *Shea* v. *Export Steamship Corporation*, 253 N. Y. 17. There, a judgment against a private operating agent was reversed and the complaint dismissed.

The Circuit Court of Appeals for the Second Circuit understood it, for the complaint in the *Lustgarten* case was dismissed. *Lustgarten* v. *United States*, 5 F. Supp. 746.

Bench and bar have understood it, for, although there have been numerous suits against the United States in Admiralty for maritime torts occurring on vessels operated for the United States by private operating agents, and, although there have been numerous decrees against the United States, there has not been, until the present case, any judgment for a maritime tort against a private operator for the United States.

The judgment in the case at bar was permitted to be rendered because the District Court judge did not fully understand the point involved. He thought that the question was whether the private operating agent, or its servants, had committed the tort, and thought that the case was governed by the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. R. 126. He did not understand that the question was one of jurisdiction, that is, whether, assuming that the private operating agent or its servants had committed the tort, suit should have been brought only against the United States in Admiralty under the Suits in Admiralty Act.

All of the judges of the Circuit Court of Appeals, including Judge Clark, who dissented, understood that the question which was involved was one relating to jurisdiction. Two of the judges, Chase and Augustus Hand, reversed, on the ground that the court below did not have

jurisdiction by reason of the provisions of the Suits in Admiralty Act as construed in the *Johnson* and *Lustgarten* cases, 280 U. S. 320. Judge Clark dissented, on the ground that he did not think that the Supreme Court, notwithstanding what it had said and done in those cases, had intended such a construction. Putting it shortly, Judge Clark did not think that the Supreme Court had meant what it said. On the other hand, the majority of the court felt that it had.

As already pointed out, Judge Clark was wrong on the facts of the *Lustgarten* case. If he had appreciated that the private operating agent in that case had been adjudged liable in the sum of $10,226.50 for a tort caused by negligence, it is likely that he would not have dissented.

At this very moment Congress has before it a bill which is designed to extend still further the immunity granted by the Suits in Admiralty Act. This is known as the Bland Omnibus Bill, H. R. 7424, Senate 2695, introduced in the House on July 21, 1942. Hearings have been held. The War Shipping Administration through its Administrator and its General Counsel has advocated its passage. Probably it will be law by the time this petition is heard. The pertinent provisions of the bill are as follows:

> "That all seamen employed by or on behalf of the United States through the War Shipping Administration, or agents or other persons acting for or on behalf of the War Shipping Administration, shall, with respect to (1) death, injuries, illness, loss of effects, detention, or repatriation, or claims arising therefrom; (2) the Federal social security laws and Federal employment tax laws; and (3) allotments, have all of the rights, benefits, exemptions, privileges and liabilities of seamen employed on privately owned and operated American vessels.
>
> * * * * * * *

> "Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

It is to be noted that the exclusive jurisdiction of Admiralty over maritime torts to seamen on Government vessels is being extended to cover not only seamen employed by agents of the War Shipping Administration, but by "other persons acting for or on behalf of the War Shipping Administration."

This has become necessary because of the fact that Government vessels are now being operated not only by private operators who are agents for the United States but by so-called bare-boat charterers. That term, in the ordinary commercial sense, does not denote the existence of the relationship of principal and agent. A bare-boat charterer, commercially, acts for himself. However, a bare-boat charterer, acting for the War Shipping Administration, is a different matter. Nominally he is a bare-boat charterer, but, actually, he is acting for the United States.

On account of this situation and others like it the Suits in Admiralty Act is in the course of being amended as above set forth in order to carry still further the policy of Congress as recognized and defined by this court in the *Johnson* and *Lustgarten* cases. Essentially, that policy is based on a full appreciation that ships cannot be operated without causing injury for which the injured persons will demand compensation. For the United States to submit to all of the burdens of litigation imposed on a private operator is expensive and unnecessary. To permit its agents or other private persons or corporations acting for it to submit to such burdens is also unnecessary and expensive.

Moreover, it is expensive to the United States. As a business matter, the expense of tort litigation, including the expense for the payment of judgments, is regarded as an operating expense. It is, therefore, among the expenses which the United States must bear when it agrees to reimburse its agent or other person for his operating expenses. Therefore, the United States, acting in its own self-interest, substitutes itself as the exclusive defendant. By so doing it deals fairly with injured persons, and at the same time reserves to itself the power of direct control over litigation and its inevitable expense.

Clearly, therefore, the decision of the Circuit Court of Appeals below is not only in line with the decision of this court made in 1930, but also in line with current legislative thinking. It is submitted that the times, if nothing else, call for a denial of the petition.

B. Petitioner's Grounds for Review.

1. *Independent Agents and Agents.*

It is to be noted that the principal ground on which the petitioner seeks a review is one which none of the judges below, including the dissenting judge, would have approved. So far as can be gathered from the opinions below, all of the judges were agreed that Roosevelt Steamship Company was an operating agent for the United States in the same sense that the Consolidated Navigation Company was in the *Lustgarten* case (R. 151). Judge Clark dissented solely on the ground that the Suits in Admiralty Act, as construed by this court, did not give such operating agents immunity.

On the other hand, petitioner says that the operating agent here is not the same kind of an agent as was involved in the *Lustgarten* case. He says that the operating agent below was an "independent agent". R. 6, 8. For emphasis

he refers to it as a "private operator", (R. 3, 6) and even goes so far as to say that it is a bare-boat charterer and owner *pro hac vice* in the commercial sense. R. 5, 27. According to petitioner, the operating agent in the *Lustgarten* case was just an agent. R. 20. Therefore, petitioner argues that the *Lustgarten* case and the principles there announced do not apply here, and that the Circuit Court was wrong in the application of the law to a particular case. To correct such an error, *certiorari* is asked.

Of course, there is not any difference between the operating agent in the *Lustgarten* case and the operating agent here. As observed, all of the judges in the Circuit Court of Appeals were agreed on that. If there should be any question with respect to it, it is necessary only to compare the operating agreement in the case at bar with the operating agreement in the *Lustgarten* case. The latter can be found at pages 329 to 337 in the record of that case.

We submit in an appendix, p. 24, a schedule of pertinent provisions of both contracts, endeavoring to group them in such a way as to show that the provisions of one contract are essentially the same as those of the other. It will be seen that, by virtue of the provisions of both contracts, profits and losses belonged to the United States. However, whereas in the contract in the *Lustgarten* case the operating agent was permitted to earn certain fees which might be considered remunerative, the operating agent in the case at bar received nothing at all for the work it did except the payment of operating expenses and overhead. Strange as it may seem, the contract in this case did not provide that the operating agent should receive anything for its services. No doubt, the good relations established by this contract put it in a favorable position for obtaining a more favorable contract when the Maritime Commission was ready to sell or charter the vessels.

2. *The Merchant Marine Act of 1936.*

The petitioner resorts to another expedient in a vain attempt to construct a difference between the operating agent in the *Lustgarten* case and the operating agent below. He says that the Merchant Marine Act of 1936 changed everything. Specifically, the petitioner says:

> "The Merchant Marine Act of 1936 established a new relationship with operating agents." Brief 21.
>
> "* * * the Merchant Marine Act of 1936, in directing the Maritime Commission to procure the operation of its vessels by 'private operators', thereby superseded the Suits in Admiralty Act which contemplated a situation where Government-owned corporations, and not private independent contractors, operated the vessels." Brief 23.

This is simply untrue. The Merchant Marine Act did not make such a change. The Suits in Admiralty Act did not contemplate operation only by Government-owned corporations. It did contemplate operation by private operators for the United States. The *Lustgarten* case shows this. Moreover, the Merchant Marine Act contemplated that private operators were already acting for the United States when the Merchant Marine Act of 1936 was passed and that they should continue to act in the same capacity thereafter and until arrangements of a different sort could be made.

The operating agent in the case at bar was such a private operator. It had operated Government vessels before the Merchant Marine Act had been passed. R. 29. It continued to operate the same vessels after the Merchant Marine Act was passed, pursuant to the contract involved in this case. R. 29.

Moreover, all of this is clearly set forth in the statute itself, which shows that the words "private operator", as

used in the Merchant Marine Act, did not, as petitioner asserts, inaugurate a new dispensation, but merely continued existing arrangements temporarily.

The statute provides as follows (46 U. S. C. 1194):

> "All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this chapter. All vessels transferred to the Commission by this chapter, *and now being operated by private operators on lines in foreign commerce of the United States*, shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided, preference to be given to present operators, and all operation of the Commission's vessels by private operators under such operating agreements shall be discontinued within one year after June 29, 1936, * * *." (Italics ours.)

Significantly, this part of the statute has been omitted by petitioner.

It also provides (46 U. S. C. 1197):

> (a) * * *
>
> (b) * * *.
>
> (c) "If the highest bid is rejected, the Commission may award the charter to the next highest bidder, or may reject all bids and readvertise the line: Provided, however, That the Commission may operate the line until conditions appear to be more favorable for a reoffering of the line for private charter."

The petitioner is really inconsistent. On page 3 of his brief he correctly recognizes that the contract of the private operator in this case was a temporary operating arrangement pending the making of a satisfactory sale or charter. However, on page 5 of his brief he says that the agreement was substantially a bare-boat charter. Of course, he is wrong in the latter statement. The agreement is not even remotely similar to a bare-boat charter, and was entered into, pursuant to statute, because chartering was impossible. R. 29.

It is clear, therefore, that Roosevelt Steamship Company, the operating agent in the case at bar, was the same kind of operating agent as the operating agent in the *Lustgarten* case, and that the Circuit Court of Appeals was correct in applying to it the rule announced therein.

3. *The obligation of the United States to reimburse its agent.*

The petitioner's argument that the operating agent here is different from the operating agent in the Lustgarten case is put in several different forms. For instance, the petitioner says that there is no legal obligation on the United States to reimburse the operating agent in the case at bar for damages paid as a result of its own negligence. Petitioner's Brief, page 18.

This harks back to the *Lustgarten* case, where this court said, at page 326:

> "On the facts above stated, it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. §8, Suits in Admiralty Act; 46 U. S. C. §748. Cf. Minnesota *v.* Hitchcock, 185 U. S. 373, 387."

In this case, says the petitioner, the money to pay the judgment will not come "mediately" from the United States, and, therefore, the operating agent here is not like the operating agent in the Lustgarten case.

Judge Clark was attracted by this argument. R. 153. However, as already noted, Judge Clark and the petitioner have wrongly assumed that the judgment in the Lustgarten case was for maintenance and cure only. They failed to perceive that the judgment in that case was really for a tort caused by the agent's negligence and that the Supreme Court, when it said that the money to pay the judgment would come out of the United States, meant that the United States had contracted to pay it.

The contract in that case provided that the United States should pay the operating expenses incurred by the agent. Lustgarten Record, 330. Tort judgments on account of negligence are among the operating expenses of operating steamships, and the Supreme Court recognized them as such in that case.

So, in the case at bar. The United States agreed to pay the operating expenses (R. 33) and, therefore, agreed to reimburse the agent for money spent by the operating agent in paying judgments for tort caused by negligence.

Of course, generally speaking, there is not any obligation on the part of a principal to indemnify an agent if the latter is required to pay a judgment based on negligence. However, such an obligation, like any other, can arise by express contract or by implication in fact. In the case at bar as in the *Lustgarten* case it arises by express contract.

Among the "facts" to which the Supreme Court must have referred when it said that the money to pay the tort judgment in that case would come out of the United States were the provisions of the operating contract. Thus, the

Supreme Court said, in giving the facts on which the decision in the *Lustgarten* case was based (280 U. S. 322):

> "March 6, 1926, the steamship *Coelleda* was a merchant vessel owned by the United States and *operated for it by the Navigation Company as agent pursuant to an agreement* made by the United States acting through the Shipping Board represented by the Fleet Corporation. Merchant Marine Act 1920, §§12, 35, 41 Stat. 993, 1007; 46 U. S. C., §§871, 886. Respondent was a seaman employed thereon. This is an action at law brought by him in the United States District Court, Southern District of New York, against the Fleet Corporation and the Navigation Company, to recover damages for injuries alleged to have been sustained by him while in that service." (Italics ours.)

On the trial below, counsel for Roosevelt Steamship Co. Inc., the operating agent, anticipated correctly that counsel for the petitioner would claim that the phrase "expenses, except overhead, incident to the management, operation" does not include expenses caused by judgments based on negligence. R. 334, 33. Therefore, and in order to remove any uncertainty or ambiguity which might result if such a contention were made, the operating agent offered evidence as to what the parties to the contract meant by the words they had used (R. 336). William E. Collins, District Counsel at New York for the United States Maritime Commission, and Special Assistant to the United States Attorney in Admiralty matters, objected to the maintenance of the action against the operating agent, on the ground that the United States would have to pay any judgment which was rendered. R. 107-110. Mr. Collins, of course, did not appear for the United States in the action. In this circumstance petitioner sees a strange significance. Petitioner's

Brief, page 18. However, there was nothing strange about it. Mr. Collins could not appear for the United States in the action. The United States was not a party, and could not become a party to a common law action in which the plaintiff chose only to name the operating agent as a defendant.

In addition to Mr. Collins, the operating agent produced the certifying officer of the Maritime Commission and counsel for the operating agent offered to prove through him that judgments for tort against the operating agent were among the operating expenses paid by the United States in actual practice. This evidence was refused. R. 112, 113.

Notwithstanding this offer of evidence and respondent's claim of error in the refusal of the trial court to permit the operating agent to show the vital matter of the usage between the parties, Judge Clark decided the matter out of hand in the following two sentences (R. 153):

> "We are not dealing with operating expenses for which the United States must provide the money under the operating contract, but for wrongdoing —negligence—of the operator. * * *. Counsel suggested that the government in fact would provide reimbursement to the operator here; but that would seem favor, not right."

In so doing, Judge Clark committed a double error. First, he was wrong as to the facts of the *Lustgarten* case where the Supreme Court had held that expenses caused by "wrongdoing—negligence—of the operator" were among the operating expenses which the United States was obliged to pay. Second, he denied to the operating agent its day in court by foreclosing it in the matter of proof. It would seem, therefore, that if the point raised by Judge

Clark were to gain the consideration of this court, the respondent should be accorded at some stage of the proceedings an opportunity to be heard and to have decided its claim of error with respect to the refusal of the above mentioned evidence.

Fortunately, the refusal of this evidence offered by the operating agent was not harmful. The majority of the Circuit Court of Appeals held that the existence or nonexistence of a right of the operating agent to reimbursement by the United States was not decisive. R. 151. The Circuit Court of Appeals did not, as the petitioner says, hold that in this case there was not such a right of reimbursement. It held that it did not matter whether there was or not. R. 151. What mattered was that the vessel which was involved was operated "by or for the United States." R. 151.

This is the statutory criterion for the application of the statute. 46 U. S. C. §741, 742. It is the criterion used by this court in the *Lustgarten* case, 280 U. S. 326. The matter of indemnification of the agent by the United States, after all, is not and could not, in the nature of things, be a satisfactory criterion for the application of the Suits in Admiralty Act. Nor, it is submitted, did the Supreme Court, when it referred to such an obligation in the *Lustgarten* case, mean to make it the criterion. It is obvious that the court meant merely to indicate one of the reasons for the policy of Congress which the act was designed to implement. 280 U. S. 320 at 326.

4. *Insurance.*

Closely allied with petitioner's argument based on an asserted absence of the agent's right of reimbursement are petitioner's statements that neither the United States nor the operating agent will have to pay the judgment because

an insurance company is obliged to pay it by contract. Such statements are wholly unsupported by the record.

In the first place, petitioner says that the operating contract between the United States and the operating agent required the latter to procure liability insurance to indemnify itself against damage suits. Petitioner's Brief, p. 17. However, the contract does not so provide. It provides that the operating agent must obtain such insurance to protect the United States. The words of the contract are that "the Managing Agent shall provide, *for the account of the Owner* and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary." (Italics ours.) There is no other provision in the contract with respect to such insurance. R. 37. Moreover, this is all the evidence there is in the record with respect to insurance. Specifically, there is no evidence to show that insurance was actually obtained covering either the United States or the operating agent, and, if so, what the provisions of such a policy were.

The petitioner has simply assumed that the United States and Roosevelt Steamship Company, Inc. were fully covered by insurance. But counsel for Roosevelt Steamship Company, Inc. asserted on the trial that such was not the case, that he was ready to prove it, and that, by reason of a so-called "deductible clause" the United States was a co-insurer. R. 115. Therefore, as a matter of cold fact, the United States was financially interested, without expectation of reimbursement by an insurer, in the first part of any judgment which might be rendered. R. 115.

In addition, it did not follow from the false assumption that there was full insurance that the United States would not be financially interested. Counsel for the operating agent asserted that the judgment had to be paid first before

the insurer could be called on for reimbursement, and that he was ready to prove it. R. 115. Since, as between the United States and the operating agent, the United States had to reimburse the agent, the actual practice was for the United States to issue a United States check and then to submit its claim for reimbursement to the insurance company. R. 115. Therefore, the United States was financially interested in the whole judgment. It had to pay it before it could obtain even partial reimbursement.

Actually, it was wholly irrelevant to that financial interest that either the United States or the operating agent had a contract with an insurance company for either whole or partial reimbursement. The insurance company might default. Furthermore, anyone who is familiar with protection and indemnity insurance knows that it is on a mutual basis. The loss record of the United States or any other shipowner in one year influences the premium payments it has to make in the year following.

It is not to be wondered at, therefore, that the Circuit Court of Appeals relied on the *Lustgarten* decision and held that the exclusive jurisdiction of Admiralty depended solely on whether the vessel involved was being operated "by or for the United States." The petitioner was contending, and, seemingly, still contends, that such jurisdiction should depend on the provisions of an insurance policy which the petitioner did not take the trouble to even prove!

The petitioner's contention with respect to the operating agent's obligation to furnish a bond for faithful performance is of the same piece. Petition, pp. 4, 7. It has nothing to do with the matter. The operating agent in the *Lustgarten* case was also obliged to furnish a bond for faithful performance (Lustgarten Record, 336) but the Supreme Court held that it was not liable for the tort.

C. Certain Subordinate Contentions.

There are several subordinate matters which the petitioner sets forth in the petition, which are also irrelevant, but which may cause confusion unless explained.

1. First, petitioner complains that the Circuit Court of Appeals failed to note that the petitioner could not sue the United States under the Suits in Admiralty Act because she had accepted compensation from the United States under the Federal Employees' Compensation Act. Therefore, says the petitioner, the Circuit Court of Appeals was wrong because it directed the petitioner along a road which does not exist.

However, the petitioner has gotten the cart before the horse. The Circuit Court of Appeals did not say that the petitioner could sue the United States under the Suits in Admiralty Act. It held that the petitioner could not sue the agent. The exact legal situation is as follows:

When the death of petitioner's intestate occurred she had two ways of obtaining money. Since her husband was a customs inspector and a civil employee of the United States she was entitled to compensation under the U. S. Employees' Compensation Act. 5 U. S. C., §751 *et seq.* She was also entitled to sue the United States under the Suits in Admiralty Act and to claim therein that the United States was liable because those acting for the United States had caused the death of her husband by negligence.

However, petitioner was not entitled to both of these remedies. It was incumbent on her to elect which one she would take. *Dahn* v. *Davis*, 258 U. S. 421.

The petitioner elected to obtain compensation from the United States and in so doing voluntarily relinquished her right to sue the United States under the Suits in Ad-

miralty Act. R. 114, 115. This suit actually represents an attempt to avoid the effect of that relinquishment by suing the agent of the United States.

The Circuit Court of Appeals therefore has not held that the petitioner should now sue the United States in Admiralty rather than the agent of the United States at common law. It has held in effect that, if the petitioner had a cause of action arising out of the death of her husband, suit should have been brought against the United States in Admiralty.

There is no doubt that the petitioner could have done this. She chose not to do it and thereby obtained the certain remedy of compensation as compared with the uncertain remedy of *tort* litigation. Under the law she is entitled to compensation for the rest of her life.

2. The petitioner has included as Exhibit A a letter of the U. S. Employees' Compensation Commission in which it is said "That body is interested in having the decision below reviewed, as the same may affect action of this Commission in numerous other cases arising under the Federal Employees' Compensation Act." Just how the action of the Employees' Compensation Commission might be affected remains obscure. Apparently, the only interest of the United States Employees' Compensation Commission is financial. If the petitioner recovers a judgment she must use it to reimburse the Employees' Compensation Commission for such sums as have been paid her, or may be paid her in the future.

Seemingly, in order to indicate that there is some other reason for the interest of the United States Employees' Compensation Commission, petitioner says, on page 7, that the United States Employees' Compensation Act authorizes

a suit against a third person to collect damages caused by a tort. The petitioner then asks whether the decision of the Circuit Court of Appeals below shall be permitted to nullify the United States Employees' Compensation Act. Petition, p. 7.

It will be noted that the Employees' Compensation Act does not "authorize" a suit against a third party. It provides merely that where a person entitled to compensation has a cause of action against a third party the United States may require an assignment of that cause of action to the United States or may permit the person to sue. If there is a recovery, it benefits the United States Employees' Compensation Commission which, in that case, does not have to pay so much compensation. 5 U. S. C. §§776, 777(A).

3. On pages 26 and 27 petitioner cites two cases in the Second Circuit which, according to petitioner, show that an operating agent acting either for the Fleet Corporation or the United States can be held liable for negligence in the commission of a maritime tort. These cases are *Blumenthal* v. *United States*, 30 Fed. (2d) 247, (2) (Second Circuit) and *N. Y. & Cuba Mail* v. *United States*, 12 Fed. (2d) 348 (Second Circuit). Just why these cases are cited it is difficult to imagine. Petitioner's counsel must have known that the *Blumenthal* case was decided in 1929 and the *N. Y. & Cuba Mail* case was decided in 1926. Both were Admiralty cases, and, so far as the suits were against the United States, were pursuant to the Suits in Admiralty Act. However, both cases were decided before the Supreme Court had construed the Suits in Admiralty Act in the cases of *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation* and *U. S. Shipping Board Emergency Fleet Corporation, et al.* v. *Lustgarten*, 280 U. S. 320 (1930).

The cases are, therefore, irrelevant to the point involved in this petition, which is concerned with the construction of the Suits in Admiralty Act as set forth particularly in the *Lustgarten* case and the application of that construction to the facts in the case at bar.

On page 9 of the petition, petitioner's counsel refers to the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, certiorari denied, 62 S. Ct. 185. Petitioner's counsel notes that petitioner relied on that case below. On page 11 of the petition, petitioner's counsel notes that Judge Clark, in his dissenting opinion "did not see any distinction between the *Quinn* case, in which a bridge tender was killed on the bridge, a non-maritime tort, and the Brady's ship's ladder case, a maritime tort. Moreover, on page 12 of the petition, petitioner's counsel says that he does not see any difference. To quote him:

> "The circumstance that Quinn suffered a land tort and Brady suffered a maritime tort is too artificial and unsubstantial to form the basis for a determination that Quinn may sue at law but Brady cannot."

We suppose it is somewhat irrelevant to quote against counsel what he has said in other cases. However, for what it may be worth, we point out that Mr. Gazan, who wrote the petition and brief herein, wrote the brief in opposition to the petition for certiorari in the *Quinn* case, and there, on page 9, said:

> "Since this was not a maritime tort, the Suits in Admiralty Act had no application. Quinn and Oakes were shore workers, not members of the crew. Theirs was a common law cause of action under the state law of Delaware, the *locus delicti*."

Furthermore, petitioner's counsel has shown by his actions over the years an understanding of the law which seems to differ from what is set forth in the petition and brief.

In the following cases he brought suit against the United States of America notwithstanding that the vessel was operated for the United States by a private operator. It is not to be believed that he would have sacrificed a jury if he had not thought he was obliged to do so:

Kunschman v. *United States, et al.*, 54 F. (2d) 987 (1982); see page 3 of the case record, where the libel alleges operation by Roosevelt Steamship Company, Inc.; *Johnson* v. *United States*, 74 F. (2d) 703 (1935); see page 704, where the court says that the vessel was "operated by Roosevelt Steamship Company for account of the Emergency Fleet Corporation"; *Miller* v. *United States*, 1940 AMC 475, Southern District New York, February 7, 1940; *Hubbard* v. *United States*, 1940 AMC 1074, Southern District New York, May 27, 1940; *Reid* v. *United States*, 1941 AMC 816, Southern District New York, March 28, 1941. (In the last three cases the operating agent was Moore & McCormack. In the report of the Reid case it is stated that Moore & McCormack were managing agents. This was five years after the passage of the Merchant Marine Act of 1936.)

D. Conclusion.

The petition should be denied. Congressional policy has confined petitioner to a choice between two substantial remedies: United States Compensation or United States litigation. Petitioner merely seeks to enlarge the field of her choice of remedies. She wishes to pursue the remedy

of private litigation and she seeks this after she has already exercised the compensation remedy. There is no need of, and the petition herein does not give any good reason for, permitting this and thereby changing the well-established and well-understood construction of the Suits in Admiralty Act set forth in the *Eastgarten* case. Indeed, to do so would be to upset the basis on which important legislation is now being predicated.

Respectfully submitted,

RAYMOND PARMER and
VERNON SIMS JONES,
Attorneys for Respondent.

APPENDIX.

There is set forth below significant portions of the operating contracts involved in the present case and in the case of *U. S. Shipping Board Emergency Fleet Corporation et al.* v. *Lustgarten*, 280 U. S. 320. They are grouped for easy comparison of similar provisions of each contract.

1. *Roosevelt Contract.* R. 28, 30.

"This Agreement made on the 28th day of June, 1937, between the United States Maritime Commission, hereinafter sometimes designated as the Owner, and Roosevelt Steamship Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent.

Whereas, the Commission is the Owner of the following vessels (herein sometimes referred to as the Owner's vessels) presently managed and operated for its account by the Managing Agent in a Line known as the American Pioneer Line (herein sometimes referred to as the Line): R. 28.

* * * * * *

Whereas, * * * the Owner has determined that, in order to carry on the activities authorized by the Act, it is necessary for the Owner to enter into this agreement for the operation of the Line for its account by the Managing Agent for the period and subject to the terms and conditions hereinafter set forth; and

Whereas, the Managing Agent has indicated its willingness to undertake the management and operation of the Line for said period and subject to said terms and conditions;" R. 30.

Consolidated Contract. Lustgarten Record 329.

"This Agreement made in duplicate the 1st day of May 1924, between the United States of America,

hereinafter designated as The Owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, hereinafter called The Agent, witnesseth:"

2. *Roosevelt Contract.* R. 30.

"The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The Managing Agent hereby accepts said appointment."

Consolidated Contract. Lustgarten Record. 329.

"The Owner appoints The Agent as its agent to manage, operate, and conduct the business of such vessel as it has assigned or may assign to The Agent under the supervision of The Owner at all times."

"The Agent agrees to act as such agent and to manage, operate and conduct the business of such vessels in accordance with the directions, orders, and regulations which The Owner may from time to time prescribe."

3. *Roosevelt Contract.* R. 33, 39.

"The managing agent agrees to man, equip, victual, supply and operate the vessels subject to such restrictions and in such manner as the owner may prescribe, and to certify or approve for payment by the owner the true course thereof and all other costs and expenses except overhead incident to the management, operation and conduct of business of the vessels as the owner may from time to time direct." R. 33.

"The owner agrees to pay to the managing agent the actual overhead expenses of the managing agent determined by the owner to have been fairly and reasonably incurred, and to be properly applicable to the management and operation of the Commission's vessels under this agreement." R. 39.

Consolidated Contract. Lustgarten Record, 330.

"The Agent agrees to man, equip, victual and supply such vessels, subject to such restrictions and in such manner as The Owner may prescribe, and to pay for account of The Owner the cost thereof and all other costs and expenses incident to the management, operation and conduct of business of such vessel as The Agent may from time to time be directed by The Owner."

4. *Roosevelt Contract.* R. 32.

"The Managing Agent shall manage and operate the said vessels exclusively under the trade name American Pioneer Line. Such trade name shall remain the property of the Owner and the Managing Agent shall have no further right to the use of said trade name upon termination of this agreement as herein provided."

Consolidated Contract. Lustgarten Record, 336.

"The trade name under which a line or route is operated with vessels of The Owner shall be subject to the approval of The Owner, and shall not contain the name of The Agent, and such trade name shall remain the property of The Owner."

5. *Roosevelt Contract.* R. 34.

"The Managing Agent agrees to conduct its operations with respect to the vessels . . . in full compliance with applicable provisions of law, and par-

ticularly the Act, and in the most economical and efficient manner, but with due regard to the wage and manning scales and working conditions prescribed by the Owner. The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner."

Consolidated Contract. Lustgarten Record, 330.

"The Agent agrees to exercise reasonable care to protect and safeguard the interests of The Owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to The Owner."

6. *Roosevelt Contract.* R. 36.

"The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts and will effect maintenance and voyage repairs and replacements."

Consolidated Contract. Lustgarten Record, 330.

"The Agent shall, subject to such regulation or methods of supervision and inspection as may be required by The Owner, exercise reasonable care to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture and equipment."

7. *Roosevelt Contract.* R. 38.

The Managing Agent agrees to provide a bond in the sum of $80,000, "to be conditioned upon the due and faithful performance of all and singular the

covenants and agreements of the Managing Agent contained in this agreement, * * *"

Consolidated Contract. Lustgarten Record, 336.

"The Agent agrees, whenever required by The Owner, to furnish a bond satisfactory to The Owner for the faithful performance of The Agent's duties and obligations hereunder."

8. *Roosevelt Contract.* R. 41.

"Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner."

Consolidated Contract. Lustgarten Record, 331.

"The selection by The Agent or agents or subagents shall be subject to disapproval by The Owner. The Agent shall be responsible to The Owner in all respects for the acts of any subagent selected by him, and such subagents shall not be in any respect the agents of The Owner but solely the agents of the said Agent."

9. *Roosevelt Contract.* R. 42.

"The Owner may terminate this agreement * * * in case of the occurrence of any of the following events of default:

(a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment, * * * whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent, unless the prior written consent of the Owner is obtained."

Consolidated Contract. Lustgarten Record, 336.

"The Owner shall have the right at any time to terminate this agreement as to any and all vessels

assigned to The Agent, and to assume control forthwith of any or all of said vessels, and to collect directly all freight moneys or other debts remaining unpaid."

10. *Roosevelt Contract.* R. 33.

"All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all moneys and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all moneys collected by it or its subagents or moneys disbursed by its subagents."

Consolidated Contract. Lustgarten Record, 331, 332.

"The Agent agrees to collect when due all freight and other moneys accruing to The Owner arising out of the management, operation and business of the vessels," (331).

"The Agent agrees to deposit all moneys collected on behalf of The Owner in a national bank or bank which is a member of the United States Federal Reserve Association or such other bank as may be approved by The Owner as a separate fund in the name of the United States Shipping Board Emergency Fleet Corporation, which money shall, in so far as The Agent is concerned, be the property of The Owner, and drawn upon only as directed by The Owner." (331).

"The Owner shall pay to The Agent as full compensation for The Agent's services the commissions and fees specified hereunder as follows" (332):

(There follows a schedule of fees with respect to cargo, passenger revenue, etc.)

11. *Roosevelt Contract.* R. 37.

"The Owner shall provide, without cost or expense to the Managing Agent, hull machinery, and port risk insurance, and the Managing Agent shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary.".

Consolidated Contract. Lustgarten Record, 330.

There is no specific reference to insurance. The matter is dealt with generally as follows:

"The Agent agrees to exercise reasonable care to protect and safeguard the interests of The Owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to The Owner."